Dato' Shazryl Eskay bin Abdullah v Merong Mahawangsa Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1438 OF 2011
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
5 SEPTEMBER 2013

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Contract — Agreement — Breach — Whether post contract conducts are relevant and can be taken into account in determining breach

Contract — Agreement — Construction of — Breach — Term stipulating for payment of commission upon successful award of project — Project awarded but subsequently cancelled — Whether commission still payable

D

Contract — Construction of terms of contract — Intention of parties — Court not to rewrite contracts — Courts to enforce certainty in trade and commerce

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The appellant was requested by the respondent to lobby and procure the project known as 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' ('bridge project') for a consideration. This request was embodied in a letter of undertaking addressed to the appellant. The appellant had succeeded in obtaining the bridge project for the respondent and in view of the failure of payment of RM20,000,000 by the respondent, the appellant filed this suit. The bridge project later evolved into what is now known as 'the Crooked Bridge Project', the construction of which was terminated by the government. The learned judge dismissed the appellant's claim on the grounds that the claim was incompetent under the letter of undertaking as the bridge project had been terminated by government. The appellant appealed against this decision.

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Held, allowing the appeal with costs:

(1) Looking at the words employed in the letter of undertaking, the appellant's claim must succeed for the simple reason that it referred to the award of the project as opposed to project itself. Clause 4 specifically stated that the letter of undertaking shall remain valid as long as the 'award for the project' remains valid and subsisting. At no time was the award of the project terminated or withdrawn by the government (see paras 14–15).

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(2) It is trite law that courts cannot rewrite contracts. Furthermore

commercial contracts of such magnitude, would only be entered into by parties after seeking best legal and commercial advices. It is thus always the policy of the courts to enforce such agreements to ensure stability and certainty in the trade and commerce in the country (see para 17).

(3) In construing any document, post contract conducts are irrelevant and cannot be taken into account. The learned judge erred in his deliberation when he took into account of the 2006 termination of the project by the government bearing in mind that the letter of undertaking was dated 3 July 1998, the appellant's cause of action commenced on 3 November 1998 (payment date) and date of the claim was 7 July 2002. Had the trial of the case commenced and concluded prior to 2006, the learned judge could not have taken into consideration of the 2006 termination in his deliberation (see paras 18–19).

[Bahasa Malaysia summary

Perayu diminta oleh responden untuk melobi dan mendapatkan projek yang dikenali sebagai 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' ('Projek jambatan') untuk balasan. Permintaan ini terangkum di dalam surat aku janji yang dialamatkan kepada perayu. Perayu telah berjaya dalam mendapatkan projek jambatan untuk responden dan mengambil kira kegagalan bayaran sebanyak RM20,000,000 oleh responden, perayu memfailkan tindakan ini. Projek jambatan kemudiannya bertukar dan kini dikenali sebagai 'the Crooked Bridge Project', pembinaannya telah ditamatkan oleh kerajaan. Hakim yang bijaksana menolak tuntutan perayu atas alasan bahawa tuntutan tersebut tidak kompeten di bawah surat aku janji memandangkan projek jambatan tersebut telah ditamatkan oleh kerajaan. Perayu merayu terhadap keputusan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Melihat kepada perkataan-perkataan yang digunakan di dalam surat aku janji, tuntutan perayu mesti berjaya untuk alasan yang mudah bahawa ia merujuk kepada award projek bertentangan kepada projek itu sendiri. Klausa 4 secara spesifikasi menyatakan bahawa surat aku janji akan kekal sah selagi 'award for the project' kekal sah dan wujud. Tidak pernah award tersebut ditamatkan atau ditarik balik oleh kerajaan (lihat perenggan 14–15).

(2) Adalah undang-undang nyata bahawa mahkamah tidak boleh menulis semula kontrak. Selanjutnya kontrak komersial sebenar ini, hanya akan dimasuki oleh pihak-pihak selepas mendapat nasihat terbaik daripada seji undang-undang dan komersial. Ia oleh itu adalah menjadi polisi mahkamah untuk menguatkuasakan perjanjian sedemikian untuk memastikan keadaan stabil dan ketentuan dalam perniagaan dan perdagangan di dalam negara (lihat perenggan 17).

(3) Dalam mentafsir apa-apa dokumen, tindakan selepas kontrak adalah tidak relevan dan tidak boleh diambil kira. Hakim yang bijaksana tersilap dalam pertimbangannya apabila beliau mengambil kira penamatan pada tahun 2006 projek tersebut oleh kerajaan mengambil kira bahawa surat aku janji tersebut bertarikh 3 Julai 1998, kausa tindakan perayu bermula pada 3 November 1998 (tarikh bayaran) dan tarikh tuntutan tersebut adalah pada 7 Julai 2002. Jika perbicaraan kes bermula dan berakhir sebelum tahun 2006, hakim yang bijaksanan tidak boleh mempertimbangkan penamatan tahun 2006 dalam pertimbangannya (lihat perenggan 18–19).]

Notes

For a case breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

For cases on intention of parties, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3968–3993.

For cases on construction of, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2966–2967.

Cases referred to

Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (refd)

Wickman Tools v Schuler AG [1974] AC 235, HL (refd)

Appeal from: In Matter No S6(5)–2216 of 2002 (High Court, Kuala Lumpur)

CV Prabhakaran (AB Teoh and Michael Teoh with him) (AB Teoh & Shariza) for the appellant.

Stanley KW Chang (CH Loh with him) (Stanley Chang & Partners) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the decision of the High Court after a full trial where the learned judge dismissed the appellant's claim of RM20,000,000 for services rendered as set out in a letter of undertaking dated 3 July 1998.

[2] We heard the appeal and after giving due consideration to respective

submissions, we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[3] Though the case went for a full trial, the factual matrix in our view is largely undisputed and quite straight forward and they are these. The appellant was requested by the respondent to lobby and procure the project known as 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' ('bridge project') for a consideration.

[4] This request is embodied in a letter of undertaking addressed to the appellant, the contents of which read as follows:

> WHEREAS the Procuror has at our request agreed to render his services for the purpose of procuring and securing from the Government of Malaysia the award of the project known as 'Cadangan Pembinaan Jambatan Menggantikan Tambak Johor secara Penswastaan' of 3 Jalan 222, 46000 Petaling Jaya (Company Registration No 452586-U) (hereinafter called the 'Consortium') of which we have a 60% equity participation in the issued share capital.
>
> WHEREAS through the Procuror's services aforesaid the Unit Perancang Ekonomi Jabatan Perdana Menteri by letter dated 25 June 1998 has awarded in principle the project to the Consortium.
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> In consideration of the services aforesaid rendered by the Procuror we Merong Mahawangsa Sdn Bhd (Company Registration No 463227-X) a Company incorporated in Malaysia and having its registered address at No 3374, Jalan 18/31, Taman Sri Serdang, 4330 Seri Kembangan, Selangor Darul Ehsan hereby undertakes and agrees to pay you the sum of Ringgit Malaysia Twenty Million only (RM20,000,000.00) being agreed remuneration payable on or before the 3rd November 1998.
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> This Undertaking shall remain valid so long as the award for the project remains valid and subsisting and should the award be withdrawn and/or terminated for any reasons whatsoever the aforesaid sum of RM20,000,000.00 or any part thereof shall be refunded without interest immediately.
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> Dated this 3rd day July 1998.

[5] It is undisputed that the appellant had succeeded in obtaining the bridge project for the respondent and in view of the failure of payment of RM20,000,000 by the respondent, the appellant filed this suit.

[6] The bridge project was later evolved into what is now known as 'the Crooked Bridge Project' which the government terminated the construction of the same. And there is no appeal against the finding of fact by the learned judge that the fact that the bridge project had evolved into a crooked bridge project and there is a sufficient link between the two which still entitles the appellant

to claim under the letter of undertaking.

HIGH COURT DECISION

[7] The learned judge's grounds in brief concerned two main issues which are as follows:

(a) whether the evolving of the bridge project into a crooked bridge project renders the appellant's claim incompetent under the letter of undertaking?

(b) whether the termination of the crooked bridge project renders the appellant's claim under the letter of undertaking incompetent?

[8] In respect of the first issue, the learned judge had this to say:

> The Defendants have taken pains to show that the bridge in both the projects were very different as shown in the comparison table in paragraph 12 of their outline submission (encl 105). The Defendants' contention that the award given to Gerbang Perdana Sdn Bhd for the construction of the said GSB project on a turnkey basis is not the same project as the original bridge project for which the Plaintiff had rendered his services cannot be accepted by this Court. This Court finds that the original bridge project which was to be constructed under the SIG Project on privatisation basis (exh P26) has nexus to the said GSB Project on a design and built turnkey basis (exh D27) and the parties in both the projects for which the services was rendered by the Plaintiff are closely connected to each other project. In fact, there is every reason for assimilating the causal link between the SIG Project and the GSB Project and is a reasonable reliance and inherent reliance
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> ...
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> The Plaintiff's evidence (PW3), his witness (PW1) and the second Defendant (DW3)'s testimony when considered cumulatively with the contemporaneous documents, which include the entire correspondences between the second Defendant and the Government authorities support the Plaintiff's claim that he had in fact rendered services required of him to the second Defendant which has a nexus and an inherent causative link to the GSB Project awarded to Gerbang Perdana Sdn Bhd, by the Government of Malaysia in the year 2003 (see exh P18).
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> This Court finds:
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> i. The Plaintiff was instrumental from the beginning when the proposal for the construction of the original bridge project was awarded in principle through the letter dated 25-06-1998 (exh P26), as a result of the Plaintiff's services which he had rendered to the second Defendant.
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> ii. The construction of the project known as the GSB Project on a 'Design & Built or Turnkey basis' which had subsequently surfaced as the crooked bridge was as a result of the Plaintiff's effort and services which he had rendered to the second Defendant from the beginning and has a causal link arising from the original bridge project.

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iii. The award to Gerbang Perdana Sdn Bhd by the Government of Malaysia in the year of 2003 (exh P18) (although it was later known as the 'crooked bridge' project and contains different set of terms and conditions) has nexus and a causative link to the services provided by the Plaintiff in respect of the original bridge project which did not proceed but later re-surfaced in the year 2003 and converted to the GSB Project.

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iv. The services provided by the Plaintiff from the beginning has a causal link to the GSB Project (crooked bridge project) which was awarded to Gerbang Perdana Sdn Bhd …

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[9] There is no cross-appeal by the respondent in respect of this finding of the learned judge.

[10] As for the second issue, the learned judge found that the appellant's claim is incompetent under the letter of undertaking as the bridge project had been terminated by government. The learned judge's decision is premised on cl 4 of the letter of undertaking.

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OUR GROUNDS OF DECISION

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[11] The learned judge's reasons for dismissing the claim can be seen in this part of the grounds:

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It is important to note that the plaintiff had agreed to refund any payment received if the project was not subsisting and the award is withdrawn or terminated for any reason whatsoever. There, it is untenable as contended by learned lead counsel for the plaintiff that clause 4 should only apply if the award is withdrawn or terminated and not if the project is withdrawn or terminated. Both the award and the project are interrelated or intertwined and must be considered together for the purpose of the services rendered by the plaintiff. The plaintiff's contention cannot be sustained on the facts and in law as the award and project are not independent of one another and either do not exist without the support of the other. The project is an integral and inseparable part of the award and inextricably linked.

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In the circumstances and for the reason aforesaid, the plaintiff's claim must fail not by reason that it is regarded as opposed to public policy or because the services he had provided previously to the second defendant had no nexus or a causative link to the GSB Project. The plaintiff's claim must fail because the plaintiff had agreed to refund the sum of RM20,000,000.00 or any part thereof if he had received the said payment or any part thereof on the basis and if the award is withdrawn or terminated which must necessarily include the project itself (for which the award was given) as both the award and the project itself are interrelated and intertwined and is inseparable. Consequently, and as agreed by the plaintiff as contained in said Letter of Undertaking, this court finds that the plaintiff is not entitled to the payment of RM20,000,000.00 upon considering the entire agreement clause which must be read in accordance with the principle by which the contractual documents are to be construed. Both the original bridge project (SIG project) and the GSB

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project are no longer subsisting as the same did not materialise or having been terminated. The plaintiff himself is estopped from denying the defendants to enforce clause 4 of the said Letter of Undertaking against him.

[12] At this juncture we remind ourselves the established principle of construction of commercial agreements. We can do no better than refer to the what the learned authors in *Chitty on Contracts* Vol I (27th Ed), elegantly state the principle at para 12–040:

> The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself: 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.' However, no contract is made in a vacuum. In construing the document, the court may resolve an ambiguity by looking at its commercial purpose and factual background against which it is made.

[13] In *Royal Selangor Golf Club v Anglo-Oriental (Malaya) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995, Lim Beng Choon J said:

> I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

[14] With those principles at the foremost of our minds, we now deliberate on the issue at hand. Looking at the words employed in the letter of undertaking, we are in no doubt that the appellant's claim must succeed for the simple reason that it refers to the award of the project as opposed to project itself. Clause 4 specifically states that the letter of undertaking shall remain valid as long as the 'award for the project' remains valid and subsisting. It is our view there is a world of difference between the 'award of the project' and the 'project' itself.

[15] Here it is undisputed at no time was the award of the project terminated or withdrawn by the government. In fact learned counsel for the respondent in his submission confirms this but argued that the letter of undertaking became invalid when the government terminated the by then 'crooked Bridge project' in 2006. His contention was accepted by the learned judge and with respect, we

cannot agree to that contention as it would mean that the court will be reading something which does not appear within the four corners of the letter of undertaking.

[16] There are three significant elements in the letter of undertaking and they are:

(a) there is a concession by the parties that the respondent had been awarded by the government the bridge project on 25 June 1998 through the effort of the appellant, (cl 2);

(b) the date of the letter of undertaking is 3 July 1998; and

(c) the payment due date for the RM20,000,000 is 3 November 1998.

These three elements show conclusively that the parties never intended to refer to the project itself. If they did they would not have specified the payment date a mere four months from the date of letter of undertaking. In any event, if their intention was to refer to the project itself then that could have been achieved by employment of the following words — 'this letter of undertaking shall become invalid if and when the project is terminated for whatsoever reasons'.

[17] We must also lose sight of the fact that this commercial transaction is between established and experienced businessmen. They are not the ordinary men in the omnibus so to speak. The court must assume that they can look after themselves and were fully aware of what they were getting into when they signed this letter of undertaking. It is trite law that courts cannot rewrite contracts. Furthermore commercial contracts of such magnitude, as is this one before us, would only be entered into by parties after seeking best legal and commercial advices. It is thus always the policy of the courts to enforce such agreements to ensure stability and certainty in the trade and commerce in the country. We see no reason in this case to depart from that policy.

[18] In respect of the compensation made by the government for the termination of the crooked bridge project, the learned judge made much of the fact that it was an ex-gratia payment and there was no unjust enrichment. With respect, this payment is irrelevant to how the letter of undertaking should be interpreted. The law is clear and that is in construing any document, post contract conducts are irrelevant and cannot be taken into account (see *Wickman Tools v Schuler AG* [1974] AC 235).

[19] Hence we find merit in the appellant's counsel's submission that the learned judge erred in his deliberation when he took into account of the 2006 termination of the project by the government bearing in mind that the letter of undertaking is dated 3 July 1998, the appellant's cause of action commenced on 3 November 1998 (payment date) and date of the claim was 7 July 2002.

Had the trial of the case commenced and concluded prior to 2006, the learned judge could not have taken into consideration of the 2006 termination in his deliberation.

CONCLUSION

[20] For reasons stated above, we allowed the appeal with costs of RM10,000 for each appeal to the respondent and ordered that the deposit to be refunded to the appellant.

Appeal allowed with costs.

Reported by Kanesh Sundrum